JAMES MILTON CANN

IBLA 74-148; IBLA 74-149 Decided August 16, 1974

Appeal from decisions of the Alaska State Office, Bureau of Land Management, rejecting applications to purchase a headquarters site (AA-8244), and a trade and manufacturing site (AA-8245).

Set aside and remanded.

Alaska: Possessory Rights -- Alaska: Headquarters Sites -- Alaska: Trade and Manufacturing Sites -- Withdrawals and Reservations: Generally

A notice of location of a headquarters site or a trade and manufacturing site filed less than 90 days after the land has been withdrawn from entry should be accepted if occupancy and construction of improvements had occurred before the withdrawal and within the 90-day period preceding the filing of the notice of location required by the Act of April 29, 1950, as amended, 43 U.S.C. § 687a-1 (1970).

Alaska: Possessory Rights -- Alaska: Headquarters Sites --Alaska: Trade and Manufacturing Sites -- Withdrawals and Reservations: Generally

Notices of location must be accepted for filing by the authorized land office if the land has been subject to location during the preceding 90 days. In such cases, any notice of location which has been tendered but not accepted for filing will be deemed filed as of the date of tender.

APPEARANCES: James Milton Cann, pro se.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

James Milton Cann has appealed from the October 24, 1973, and November 9, 1973, decisions of the Alaska State Office, Bureau of Land Management, rejecting, respectively, his applications to purchase a headquarters site (AA-8244), and a trade and manufacturing site (AA-8245).

Appellant filed an application to purchase the two sites in November 1972. Those applications indicate that occupancy and the placing of improvements had occurred prior to the withdrawal of the land from entry on December 14, 1968. However, no notice of location was ever filed as required by the pertinent statute, the Act of April 29, 1950, as amended, 43 U.S.C. § 687a-1 (1970). That statute provides that

> All qualified persons, associations, or corporations now holding or hereafter initiating claims subject to the provisions of section 687a of this title, shall file a notice describing such claims in the manner specified by section 270 of this title in the United States land office for this district in which the land is situated within ninety days from April 29, 1950, or within ninety days from the date of the initiation of the claim, whichever is later. Unless such notice is filed in the proper district land office within the time prescribed the claimant shall not be given credit for the occupancy maintained in the claim prior to the filing of (1) a notice of the claim in the proper district land office, or (2) an application to purchase, whichever is earlier. Application to purchase claims, along with the required proof or showing, must be filed within five years after the filing of the notice of claim under this section.

Since the statute requires that no credit be given for occupancy in the absence of filing a notice of location, the Alaska State Office considered the claims to have been initiated at the time the applications to purchase were filed in November 1972. Accordingly, the Alaska State Office rejected the applications because the land was withdrawn from entry by PLO 5177, 37 F.R. 5578 (1972), and had been withdrawn since December 14, 1968, by PLO 4582, 34 F.R. 1025 (1969).

Appellant asserts that "valid existing claims" were excepted from the effect of the withdrawals; and, he asserts, his claims are "valid existing claims" since he has done all acts necessary to perfect the claims with the exception of filing notices of location.

We have dealt with this precise argument and rejected it, principally because the cases cited in support of appellant's argument were decided before enactment of the Act of April 29, 1950, as amended, 43 U.S.C. § 687a-1 (1970), and thus have no precedential effect on cases arising after that date, especially to the extent that they contradict the plain language of the statute. Kennecott Copper Corp., 8 IBLA 21, 26, 79 I.D. 636, 638 (1972); Ralph Edmund Marshall, 14 IBLA 233 (1974).

We believe, however, that other facts alleged by appellant, if proven, would support a finding that he is entitled to receive the land. Appellant has alleged that he did, in fact, attempt to file notices of location:

> In December of 1968, after learning of the pending land freeze and the fact that it might have some bearing on my site claims, I went to the Anchorage B.L.M. office and attempted to file Notices of Location on my Headquarters and Trade and Manufacturing Sites, but I was refused the right to file anything; in fact, I wasn't even allowed to file notice that I was refused the right to file a Notice of Location. The exact date of such refusal has since slipped my memory, except that it was after my return from my Headquarters Site in late November of 1968 and sometime prior to Christmas of that year. (Statement of Reasons at 2).

A close reading of both the statute and the appropriate regulations indicates that a claim may be properly initiated by occupying and constructing improvements on the claims. No credit, however, may be given for such initiation if it occurs more than 90 days prior to the time the notice of location is filed in the appropriate land office. The alleged action of the Alaska State Office in refusing to accept appellant's notices of location could have stemmed from the fact that the land had been withdrawn from entry under the law pertaining to headquarters and trade and manufacturing sites, 43 U.S.C. § 687a (1970). But in this case appellant has asserted that occupancy and construction of improvements began before the withdrawal of the lands and within the 90-day filing period provided for in the Act and the regulations. Consequently, if appellant's claims were properly initiated before the withdrawal, credit should have been given for occupancy up to the date of withdrawal, notwithstanding the fact that no claim could have been initiated after the withdrawal.

The refusal of the Alaska State Office to accept the appellant's tender of his notices of location was erroneous, if, in fact, that office did refuse to accept them. Departmental regulations mandate

the acceptance of all documents which are pertinent to the administration of the public lands. For instance, 43 CFR 1821.2-2(d) provides that:

> Any document required or permitted to be filed under the regulations of this chapter, which is received in the proper office, either in the mail or by personal delivery when the office is not open to the public, shall be deemed to be filed as of the day and hour the office next opens to the public.

Since any document received when the office is closed is deemed filed as of the next day, a fortiori any document tendered for filing when the office is open must necessarily be deemed to have been filed on that date.

In addition 43 CFR 2091.1 provides in part that:

> Except where regulations provide otherwise, all applications must be accepted for filing. * * * (Emphasis added).

While the regulation states that all applications must be accepted for filing, the regulation should be construed to include the notice of location set forth in 43 U.S.C. § 687a-1 (1970). Since no right whatever can be obtained under that law without filing a notice of location, it has, for the purpose of that law, the same effect as an application.

It should be noted that where the land is not available the regulations do contemplate that a notice may be deemed "not acceptable to the proper office for recording." 43 CFR 2562.1(d). See also 43 CFR 2563.2-1(d) and 43 CFR 2567.2(c). However, these regulations are applicable only where the land has been unavailable for location for a period of at least 90 days preceding the attempt to file the notice.

Appellant will be afforded an opportunity to demonstrate to the satisfaction of the State Office, by affidavits and other evidence, that he did attempt to file notices of location and did construct his improvements before such attempt in 1967, failing in which he will be allowed a hearing. The procedure will conform with that followed in Lucille M. Frederick, 10 IBLA 85.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is set aside and remanded for action consistent with the opinions expressed herein.

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Edward W. Stuebing
Administrative Judge

I concur:

_____
Frederick Fishman
Administrative Judge

I concur in the result:

_____
Joan B. Thompson
Administrative Judge